Supreme Court No. 93321-9

(Court of Appeals No. 73493-8-I)

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Plaintiff-Respondent,

v.

MICHIKO STEHRENBERGER

Defendant-Petitioner.

APPEAL FROM DIVISION ONE
OF THE WASHINGTON COURT OF APPEALS

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Defendant/Appellant, Michiko Stehrenberger.

II. DECISION FOR WHICH REVIEW IS SOUGHT

Ms. Stehrenberger seeks review of Division I of the Court of Appeals' April 25, 2016 Opinion in Case No. 73493-8-I, *JPMorgan Chase Bank, N.A. v. Stehrenberger* (attached as A-1); its May 17, 2016 denial of her *Motion for Reconsideration* on that Opinion (attached as A-13); and its March 11, 2016 denial of her *Motion for Disqualification and Change of Venue to Financially-Disinterested Judges in Division III* (attached as A-14) and March 21, 2016 denial of reconsideration (A-15) that led up to Division's issuing of the April 25, 2016 Opinion

III. ISSUES PRESENTED FOR REVIEW

Issue 1: Is a litigant's Constitutional right to have her case heard by an impartial tribunal violated and new proceedings required when *every single one of the judges* who issued decisions in this case in favor of the Respondent Bank also personally own shares in the parent company of the Respondent Bank, but either failed to disclose the pecuniary interest prior to rendering a decision, or declined to recuse themselves from hearing this case? Short answer: Yes.

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Issue 2: Did Division I's Judges Cox, Dwyer and Schindler violate Washington's Appearance of Fairness doctrine by refusing to recuse themselves from hearing the appeal in case number 73493-8-I, when the appeal sought Division I's determination that the members of the panel in the related appeal in case number 70295-5-I, which panel also included Judges Cox and Schindler, had violated the Code of Judicial Conduct's Rule 2.11, comment 5, through their prior lack of disclosure of their ownership shares related to the Respondent Bank's parent company, and to cure this violation, should Division I's Opinions be reversed and this case now remanded for new trial court proceedings with a different judge? Short answer: Yes.

Issue 3: Did Division I prejudice Ms. Stehrenberger's appeal by inexplicably disregarding the existence of the uncontested witness declarations already on the record before it, *CP 77-86*, of multiple disinterested witnesses who have "questioned whether an fair, neutral, and impartial proceeding" has taken place under these same circumstances of the judges' ownership of stock related to the Respondent Bank at the same time as issuing decisions in favor of that Bank, and should Division I's April 25, 2016 Opinion be reversed and this case remanded for new trial court proceedings with a different judge? Short answer: Yes.

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Issue 4: Does Division I's April 25, 2016 Opinion violate the Appearance of Fairness doctrine and offend the public's notions of fair play when it seeks to *retroactively declare,* without any basis in law, that the judges' formerly undisclosed ownership of shares was merely a de minimis amount – and even when the Code of Judicial Conduct's Rule 2.11(C) specifically requires that it be the parties themselves , and not the judge, to be the ones to determine whether the judge's interest is de minimis and for the parties to then either (1) waive any conflict in writing, or (2) obtain a different judge, as a matter of right guaranteed under RCW 4.12.050? If so, should Division I be reversed and this case remanded for new trial court proceedings before a different judge? Short answer: Yes.

Issue 5: Does this Court adopt the U.S. Supreme Court's holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 n. 11, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988), and Division III in its decision in *Tatham v. Rogers*, 170 Wn.App. 76, 101, 283 P.3d 583 (2012), that "the basis for relief where a [...] court fails to comply with the judicial code is *extraordinary*," and if so, should Division I be reversed, all prior rulings vacated, and this case remanded for new trial court proceedings before a different judge? Short answer: Yes.

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IV. STATEMENT OF THE CASE / PROCEDURAL HISTORY

This is the second time this case has come before this Court seeking its review. In the intervening time period since 2014, new discoveries were made revealing the undisclosed ownership of shares in the parent company of the Respondent Bank, JPMorgan Chase Bank, N.A. (the "Bank") of the judges involved in this case, including its prior appeal. Neither the Bank, nor the judges themselves, dispute that each of the five judges involved in the decision-making in this case concurrently owned shares in the Bank's parent corporation at the time that the judges issued a series of decisions favoring the Bank. Members of the public, through their declarations filed on the record of this case, question whether "neutral, impartial, and fair proceeding" before judges who are shareholders ever had a chance to take place.

In early 2012, this case was assigned to the Honorable John P. Erlick of the King County Superior Court. The Respondent Bank's breach of contract claim against Ms. Stehrenberger is based upon a scanned copy of a promissory note originated by Washington Mutual Bank ("WaMu"), *CP 1-13*. During the time that Judge Erlick was the trial court judge on this case, Judge Erlick owned both WaMu stock and shares in the Respondent Bank's parent corporation, JPMorgan Chase & Co, but did not disclose his ownership to the parties during the entirety of the case, and his undisclosed ownership in Chase was not discovered until 2014. *CP 1226,*

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Decl. at ¶ 6-7, 12-13, 17-18; CP 32-38, CP 77-85; Appellant's Br. at 9-10, fn. 4-5, CP 120-147. Neither Chase nor Judge Erlick dispute that during this same exact time period that , Judge Erlick owned between $11,129.00 and $18,888.79 of investment shares in the parent company of the Bank, JPMorgan Chase & Co., during the exact same time period that the Judge Erlick also issued a series of substantive rulings in favor of the Bank. *CP 204*

In 2011, Ms. Stehrenberger counterclaimed for unjust enrichment and violations of Washington's Consumer Protection Act, RCW 19.86 on the basis that the 44-page Purchase and Assumption Agreement ("PAA") between the FDIC and the Bank does not identify Ms. Stehrenberger's negotiable instrument, nor any other assets the Bank claims to have acquired from the FDIC. In discovery, the Bank made the surprising admission that no Schedule of Assets identifying what had actually belonged to the failed bank or the FDIC as its Receiver had ever been created as part of the of the fully-integrated PAA; at this point Ms. Stehrenberger's affirmative defenses and counterclaims seeking a court declaration regarding the Bank's questionable claims to the assets under the PAA then developed the ability to substantially affect the bulk of the billions of loans and assets upon which the Bank and its parent corporation claims to have increased the value of its shares to its shareholders.

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In March of 2013, the parties stipulated on the record that the promissory note is a negotiable instrument governed by RCW 62A.3, Washington's adoption of the Uniform Commercial Code. The Bank, which had never loaned any money on this instrument and had not been merged by corporate merger with Washington Mutual Bank, was unable to meet its burden of proof to show that it had received physical delivery of the original negotiable instrument as required under RCW 62A.3-203(a) and (b) or that there is endorsement on the original instrument that would allow it to enforce payment against Ms. Stehrenberger. Unable to prevail under the governing RCW 62A.3 statute, the Bank instead claimed to have its authority to enforce under alternate common law contract principles, relying upon the "all right, title, and interest" language contained within a Purchase and Assumption Agreement ("PAA") between the Respondent Bank and the federal Receiver of Washington Mutual Bank, even when the Official Comment 1 to RCW 62A.3-203 makes clear that the Bank acquires no rights to enforce unless and until the Bank first receives physical delivery of the original instrument.[1]

Judge Erlick, with undisclosed ownership in both Washington Mutual stock and JPMorgan Chase shares, disregarded the Bank's failure of proof required under RCW 62A.3 and granted it summary judgment on April 1, 2013. Ms. Stehrenberger timely appealed, and on April 28, 2014,

[1] Addressed more fully in Appellant's May 2014 *Motion for Reconsideration* in Court of Appeals case No. 70295-5-I.

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the Court of Appeals, Division I, through a the panel of three judges comprised of the Hons. Ronald Cox, Linda Lau, and Ann Schindler affirmed in favor of the Bank in case number 70295-5-I.

Prior to issuing their April 28, 2014 opinion, Judges Cox, Lau and Schindler did not disclose that they each concurrently owned shares in JPMorgan & Co. through their retirement accounts, *CP 49-75*, and that Judge Lau additionally owned a JPMorgan bond, *CP 71*, at the same time that they affirmed in favor of the Bank. In its April 28, 2014 opinion, Division I then concluded that the Bank had somehow acquired its rights under the same RCW 62A.3-203(b) "transferee" provision, while also acknowledging that the Bank had never received the exact physical delivery "transfer" as specifically required under RCW 62A.3-203(a) and (b). Ms. Stehrenberger timely filed her reconsideration motion and Amicus Homeowners Attorneys requested leave to file their Amicus Brief in May of 2014, both of which. Division I denied. This Court denied Ms. Stehrenberger's July 7, 2014 Petition for Review on the negotiable instrument and PAA issues in case no. 90504-5 on November 5, 2014.

In late 2014 and early 2015, Ms. Stehrenberger received new information regarding the four judges' undisclosed ownership of JPMorgan Chase shares through their retirement accounts, *CP 1226*, and filed a Rule 60(b)(11) motion with the same trial court judge as required, seeking to vacate and obtain new proceedings, *CP 14-25*. The Bank filed its

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opposition, *CP 1247-1266,* and Ms. Stehrenberger filed her Reply, *CP 26-31.* Judge Erlick, now asked to rule on whether he *himself* had violated the Code of Judicial Conduct in failing to disclose his ownership in JPMorgan Chase & Co., denied the Rule 60(b)(11) motion on March 27, 2015, *CP 148-150.* Ms. Stehrenberger timely moved for reconsideration, *CP 164-176,* which was denied April 14, 2015, *CP 188,* and moved for the issuance of subpoenas to obtain the same information required for the judicial disclosures under the Code of Judicial Conduct's Rule 2.11, comment 5, and separately requested that her case file be transferred to the Chief Judge or Supervising Judge for an independent review by a different judge. *CP189-201, 211-219, 222-230, 231-236, 243-259.*

On April 24, 2015, Judge Erlick denied both the motions requesting subpoenas and review of the motions by an independent judge, issuing a Final Order prohibiting Ms. Stehrenberger from being able to make any further filings in her case to complete her record, or to communicate with the trial court regarding leave to file anything further in her case. *CP 260-263.* Barred from being able to seek any further relief at the trial court level, Ms. Stehrenberger had no alternative to obtain an impartial review but to file a second appeal with Division I, which she did on May 18, 2015, seeking reversal, vacatur and a chance for new proceedings before a financially-disinterested judge.

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On March 1, 2016, Division I assigned two of the very same judges who had previously failed to disclose their interests in the 2014 appeal, and who were part of the subject of the new appeal: Judges Cox and Schindler, along with the Hon. Stephen Dwyer, who also owns shares in the parent company of the Respondent Bank through a "Dodge & Cox" fund.

Because this new appeal requested in part Division I's determination that Judges Cox and Schindler had violated the Code of Judicial Conduct's Rule 2.11, comment 5, in not disclosing their ownership of shares in the parent company of the Respondent Bank, on March 4, 2016, Ms. Stehrenberger moved for disqualification and change of venue to Division III, where public records indicated there were at least three judges who did not concurrently own of shares related to the Respondent Bank. *COA docket in this case, no.73493-8-I.*

On March 11, 2016, the Division I panel, comprised of Judges Cox, Dwyer, and Schindler denied the motion and on March 21, 2016 denied reconsideration of her motion seeking to have the appeal heard by judges without ownership of shares related to the Respondent Bank, even when a sufficient number of non-conflicted judges were available in Division III to hear this case. *See docket, case no. 73493-8-I.*

On April 25, 2016, Division I (through Judges Cox, Dwyer, and Schindler) issued its Opinion affirming in favor of the Respondent Bank

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by *retroactively* declaring that the judges' previously undisclosed ownership of shares related to the Respondent Bank were merely de minimis and that the parties were not entitled to have received any disclosure, despite the specific upfront disclosure requirements of the Code of Judicial Conduct's Rule 2.11, comment 5. On May 17, 2016, the Division I denied reconsideration.

V. ARGUMENT

As the Division III of the Court of Appeals noted in *Tatham v. Rogers*: "Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased." (citing *Diimmel v. Campbell*, 68 Wash.2d 697, 699, 414 P.2d 1022 (1966)("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). *Tatham*, 170 Wn.App. 76, 283 P.3d 583 (2012)

Though Division I designated its opinion as unpublished, this Court should note the Code of Judicial Conduct, Rule 2.11 and its official comment 5, have only been in effect since 2011. There does not appear to be any reported case in Washington addressing the Constitutional impact of a judge's failure to disclose a pecuniary interest in a party, as required under Rule 2.11's comment 5, and the resulting deprivation the other party's right to receive notice in time to timely file a RCW 4.12.050

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motion for disqualification. As the courts have previously determined in *State v. Dixon*, 74 Wash.2d 700, 702, 446 P,2d 329 (1968), and *State v. Parra*, 122 Wn.2d 590, 594, 859 P.2d 1234(1993), under RCW 4.12.050 a party may obtain – as a matter of *right,* and not subject to the judge's discretion – a different judge for the proceeding.

This matter is one of first impression for this Court; one that impacts a large number of similarly-situated present and future parties pertaining to the massive failure of Washington Mutual Bank in 2008, as well as to court determinations made by judges whose individual retirement accounts and investments are already invested in the long-term success of the Respondent Bank in this case.

"There can be no question but that the common law and the Federal and our state constitutions guarantee to a defendant a trial before an impartial tribunal, be it judge or jury." *Tatham,* 170 Wn.App. 76 (quoting *State ex rel. McFerran v. Justice Court of Evangeline Starr,* 32 Wash.2d 544, 548, 202 P.2d 927 (1949)) "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' " *Tatham,* 170 Wn.App. 76.

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A. Considerations Governing Acceptance of Review

RAP 13.4(b) identifies four *disjunctive* considerations governing acceptance of review by this Court, three of the four which are independently satisfied here (listed in order of importance):

RAP 13.4(b)(3): The United States Constitution's Fourteenth Amendment entitles parties to their Due Process right to have their case before an impartial tribunal. A judge with a pecuniary interest in one of the parties, an interest which could be substantially affected by the judge's ruling in the case in favor or against the party in which the judge owns the interest, violates that Due Process right.

RAP 13.4(b)(1): Division I's April 25, 2016 Opinion is in direct conflict with Division III's 2012 decision in *Tatham v. Rogers*, 170 Wn.App. 76, 283 P.3d 583.(2012), in which Division III agreed with the United States Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 n. 11, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988), that "the basis for relief where a [...] court fails to comply with the judicial code is *extraordinary*," and that the Washington judges' failure to comply with the Code of Judicial Conduct's Rule 2.11, comment 5, which requires that the judge disclose interests related to one of the parties, indeed constitutes the very "extraordinary" circumstance that requires reversal and vacatur.

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RAP 13.4(b)(4): The opinions of the U.S. Supreme Court and other courts pertaining to the need for timely judicial recusal, to preserve the appearance of fairness and impartiality in proceedings, confirms that the public has a substantial interest in seeing that the standards that demand objectivity and impartiality of our judicial system are strictly enforced. This Court should accept review to correct not just a single isolated instance of injustice, but also to stop the longer-term risk of erosion of the public's confidence in the impartiality of our judicial system when instances arise such as these, implicating questionable judicial conduct related to failing to disclose the material facts of their ownership interests in the major financial institutions, many of which are already perceived to have corrupted the court system.

B. RAP 13.4 (b)(3): The Due Process Clause, and the right to a financially-disinterested, impartial tribunal.

"When a court disregards a person's due process rights, the resulting judgment is void." *Tatham,* 170 Wn.App. 76.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases," *Tatham,* 170 Wn.App. 76 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)). "The due process clause incorporated the common law rule that judges must recuse themselves when they have 'a direct, personal, substantial pecuniary interest' in a case." *Tatham,* 170

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Wn.App. 76 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

Because *Tatham* and *Ebbighausen* instruct us that the rulings by these conflicted judges' decisions are void, this case should now be reversed, with all rulings made by these judges vacated, and the case remanded for new proceedings before a different trial court judge.

C. RAP 13.4(b)(1): This Court should accept review because Division I's 2016 holding directly conflicts with Division III's 2012 holding in *Tatham v. Rogers.*

Division III adopted the U.S. Supreme Court's holding in *Liljeberg v. Health Services Acquisition Corp.* in *Tatham* in 2012, concluding that:

> [T]he basis for relief where a [...] court fails to comply with the judicial code is *extraordinary...*"

Tatham, 170 Wn.App. 76, 101, 283 P.3d 583 (2012), quoting *Liljeberg*, 486 U.S. 847, 863 n. 11, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988)(emphasis added).

On the basis of this Division split, this Court should accept review to clarify under what proper circumstances a judge may have discretion, if any, in choosing to keep secret and not disclose the judge's concurrent personal ownership of shares in one of the parties, in light of the Code of Judicial Conduct's Rule 2.11, comment 5 disclosure requirements, which went into effect on January 1, 2011.

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D. RAP 13.4(b)(4): The public has a substantial interest in making sure an individual's right to an impartial tribunal cannot simply be stripped away by a panel of judges *retroactively* declaring that the judges did not violate the law by failing to disclose.

The U.S. Supreme Court just recently determined that the issue of judicial disqualification regarding several judges working together on the same decision is of sufficient public interest for that Court to have accepted review, in *Williams v. Pennsylvania*, 2016 WL 3189529 (Slip.Op. June 9, 2016):

> A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication...Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless."

Williams, at 9.

"Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial." *Tatham*, 170 Wn.App. 76 (quoting *State v. Finch*, 137 Wash.2d 792, 808, 975 P.2d 967 (1999)). Here, Washington's Appearance of Fairness doctrine is violated when not just one, but *five* judges first fail to disclose their personal pecuniary interests through investments in the parent corporation of the Bank, and then the appellate judges reviewing

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the questioned judicial conduct then *retroactively* declare the previously-undisclosed interests simply to be de minimis based upon the judges' own undefined subjective standard – well after the fact, and only after the failure to disclose has been discovered by the parties by means other than transparent disclosure.

"A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker..." *Tatham*, 180 Wn.App. At 87. As other courts have had no trouble discerning, but Division I has nevertheless resisted:

> It is settled that a stockholder of a corporation has a 'pecuniary interest' in an action in which the corporation is interested in its individual capacity...and it follows that [the judge] is disqualified to sit in the case.

Thomson v. McGonagle, 33 Haw. 565, 566 (1935).

> [I]f a judge has a direct financial interest in the outcome of a case, such as stock ownership in a company who is a party to litigation, the judge is disqualified. Thus, it is the nature of the judge's financial interest, rather than its potential value, that determines whether the interest is disqualifying.

Fuelberg v. State, 410 S.W. 498, 504 (2013).

Justice Brenneman noted in his concurring opinion, in *Aetna Life Ins. Co. v. LaVoie*:

> [A]n interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if the goal is not actually attained in that proceeding.

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Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)(concurring opinion of J. Brennan)

"A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing," *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995), and "[t]he 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.' " *Sherman v. State*, 128 Wash.2d 164, 206, 905 P.2d 355 (1995)(quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

The emphasis is on an *objective* test; one that involves a reasonable and disinterested third-party who is not involved in the case to determine whether an impartial proceeding took place.

Certainly the judges were in no position to make that determination objectively under the circumstances, with there already being no dispute either from the Bank or these judges themselves that the judges had owned shares in the Bank that they had failed to disclose on the record of the case, even though required under CJC Rule 2.11's comment 5 to do so.

Ms. Stehrenberger presented a series of witness declarations, *CP 77-86*, in which individual witnesses not involved in this case in any way,

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went on record as questioning the impartiality of these proceedings under the circumstances of Judges Erlick, Cox, Lau and Schindler owning shares related to the Bank, not disclosing that ownership, and then issuing a series of rulings in favor of the Bank. Inexplicably, Division I chose to disregard the entire existence of these witness declarations, *CP 77-86*, and instead simply imputed its own subjective view in place of those of the actually disinterested third-party witnesses ("[A] reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." April 25, 2016 Opinion at 8-9) to reach its foregone conclusion that the judges themselves had not violated the Appearance of Fairness doctrine and had not violated the disclosure requirements of CJC Rule 2.11, comment 5.

A judge's decision in this case, either for or against the Respondent Bank, therefore, "could substantially affect the outcome" and the resulting value of these judges' ownership shares in the Respondent Bank's parent corporation. The five judges' interests are therefore the very "direct, personal, substantial, pecuniary interests" that disqualified them under *Tatham,* 170 Wn.App. 76 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927)), and as a result all of the decisions made in this case in favor of the Respondent Bank are void.

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VI. CONCLUSION

For the foregoing reasons, Ms. Stehrenberger respectfully requests the Supreme Court of Washington grant her Petition for Review and reverse, vacate, and remand her case to a different trial court judge for new proceedings, to help erase the taint of what has occurred in this case up to this point.

Dated this 16th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 27th day of May, 2016, I served a true and correct copy of the **Appellant's Petition for Review** related to Court of Appeals case # 73493-8-I, upon the Respondent, JPMorgan Chase Bank, N.A., by depositing it in an outgoing mailbox as prepaid first-class mail, upon its counsel and addressed to the following:

Mr. Hugh McCullough and Mr. Fred Burnside
Davis Wright Tremaine, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Dated June 16, 2016, at Washington, D.C..

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,	)	No. 73493-8-I
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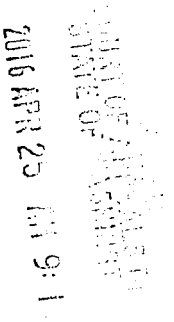
v.	)	
MICHIKO STEHRENBERGER,	)	UNPUBLISHED
Appellant.	)	FILED: April 25, 2016



Cox, J. – A judge shall disqualify himself or herself from any case in which the judge's impartiality might reasonably be questioned.[1] But the Code of Judicial Conduct does not require a judge to disqualify himself or herself when the judge only has a de minimis economic interest in the case.

Here, Michiko Stehrenberger moved for relief under CR 60(b)(11), seeking to vacate a judgment based on the alleged failure of judges to disqualify themselves from her case. Because the judges had only de minimis interests in the case, the trial court properly denied her CR 60(b)(11) motion. Additionally, the court did not abuse its discretion when it restricted Stehrenberger from filing additional motions without first obtaining the court's leave. We affirm.

In 2007, Stehrenberger executed a promissory note to Washington Mutual. In 2008, Washington Mutual failed, and the Federal Deposit Insurance Corporation placed the bank in receivership. Under a purchase and assumption

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[1] CJC 2.11(A).

agreement, JPMorgan purchased all of Washington Mutual's assets, including its loans. In 2010, Stehrenberger defaulted by failing to make payments to JPMorgan under the terms of her promissory note.

In 2011, JPMorgan commenced this action on the delinquent note. Stehrenberger answered and asserted numerous defenses and counterclaims. After extensive discovery by Stehrenberger, JPMorgan moved for summary judgment on the delinquent note and Stehrenberger's counterclaims. The trial court granted JPMorgan's motion.

Stehrenberger appealed, arguing that JPMorgan lacked the authority to enforce the promissory note because it had never physically possessed the original promissory note. This court disagreed and affirmed the judgment in favor of JPMorgan.[2] Stehrenberger petitioned for review, which the supreme court denied.

After the supreme court denied review, Stehrenberger moved for relief from the judgment under CR 60(b)(11). She argued that the trial judge and the panel of judges on this court that decided her prior appeal had violated the Code of Judicial Conduct. Specifically, she claimed they failed to disclose financial interests related to J.P. Morgan Chase and also failed to disqualify themselves from ruling on her case. She also sought to have a different trial judge decide her current motion.

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[2] JPMorgan Chase Bank, N.A. v. Stehrenberger, noted at 180 Wn. App. 1047, 2014 WL 1711765, review denied, 337 P.3d 325 (2014).

The trial judge declined to assign the motion to another judge. He also denied her motion. The judge determined that her CR 60 motion failed both procedurally and on its merits. Specifically, the court determined that Stehrenberger failed to establish non-disclosure of an economic interest in violation of the Code of Judicial Conduct.

After Stehrenberger filed several additional motions, including motions to subpoena the trial judge and members of this court who decided her case, the trial judge entered an order restricting Stehrenberger from filing additional motions without the court's leave.

Stehrenberger appeals.

DISQUALIFICATION

Stehrenberger argues that the trial judge and members of this court were disqualified from ruling on her case. We disagree.

Due process, the appearance of fairness doctrine, and the Code of Judicial Conduct may require that a judge disqualify him or herself from hearing a case under certain circumstances.[3]

"The Due Process Clause [of the federal constitution] entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."[4] But the common law and state codes of judicial conduct generally provide more

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[3] In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009).

[4] Tatham v. Rogers, 170 Wn. App. 76, 90, 283 P.3d 583 (2012) (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980)).

protection than due process requires.[5] Thus, courts generally resolve questions about judicial impartially without using the constitution.[6]

Under the appearance of fairness doctrine, judges must both be impartial and appear to be impartial.[7] "A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing."[8] The claimant must submit proof of actual or perceived bias to support an appearance of fairness violation.[9]

Parties may raise an appearance of fairness claim in a CR 60(b)(11) motion.[10] A judge violates the appearance of fairness doctrine by failing to disqualify himself or herself when the Code of Judicial Conduct requires.[11]

Washington's Code of Judicial Conduct provides that judges shall disqualify themselves in "any proceeding in which the judge's impartiality[] might

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[5] Id.

[6] Id. at 92.

[7] Id. at 80.

[8] Id. at 96.

[9] GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 154, 317 P.3d 1074 (quoting Magana v. Hyundai Motor Am., 141 Wn. App. 495, 523, 170 P.3d 1165 (2007)), rev'd on other grounds, 167 Wn.2d 570, 220 P.3d 191 (2009).

[10] Camarata v. Kittitas County, 186 Wn. App. 695, 713, 346 P.3d 822 (2015).

[11] Tatham, 170 Wn. App. at 94.

reasonably be questioned."[12] One such circumstance, for example, is where the judge has "has an economic interest[] in the subject matter in controversy or in a party to the proceeding."[13] But this requirement does not apply to de minimis interests.[14]

De minimis interests include:

> (1) an interest in the individual holdings within a mutual or common investment fund; . . . [or]
>
> (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests.[15]

"A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[16]

If a judge disqualified under this rule discloses the economic interest on the record, the parties may agree that the interest is de minimis and that the judge is qualified.[17]

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[12] CJC 2.11(A).

[13] CJC 2.11(A)(3).

[14] CJC 2.11 cmt. 6.

[15] Id.

[16] CJC 2.11 cmt. 5.

[17] CJC 2.11(C).

As a preliminary matter, the trial judge did not abuse his discretion by hearing Stehrenberger's CR 60 motion himself rather than transferring it to a different judge. A trial judge may properly hear a motion that accuses him or her of "violating the appearance of fairness doctrine by presiding over a trial and failing to disclose potential conflicts of interest."[18]

Moreover, the trial judge did not violate the Code of Judicial Conduct. Stehrenberger identified three interests she argued disqualified the trial judge: ownership of Washington Mutual stock, a retirement account that owns JPMorgan securities, and two mortgages/deeds of trust with JPMorgan. These interests are de minimis and do not require recusal or disclosure.

First, the trial judge's Washington Mutual stock was a de minimis interest because there was no evidence that this stock became JPMorgan equity when it purchased Washington Mutual. As explained earlier, Washington Mutual failed and the FDIC placed it in receivership. Any Washington Mutual stock that the trial judge owned presumably became worthless at that point. And as the trial court found, Stehrenberger did not present any evidence to show that this stock, rather than becoming worthless, became equity in JPMorgan when it purchased Washington Mutual from the FDIC.

Second, the trial judge's retirement accounts did not require disqualification in this case. The comments to the Code of Judicial Conduct establish that "interest[s] in the individual holdings within a mutual or common

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[18] Tatham, 170 Wn. App. at 88-89.

investment fund" are de minimis.[19] Here, the State invests the judge's retirement plan in "a diversified pool of investments" which includes holdings in JPMorgan. Accordingly, the trial judge had only an interest in an individual holding within a common investment fund, which is a de minimis interest.

Finally, the trial judge's mortgages/deeds of trust did not create an economic interest. Financial deposits, "proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests," are de minimis interests. To the extent that a mortgage/deed of trust is a financial interest, it is a similar de minimis interest under this rule. Stehrenberger fails to cite any authority indicating otherwise.

For similar reasons, the panel of judges on this court who decided her prior appeal were not required to either disqualify themselves or disclose economic interests. As explained earlier, any interest in JPMorgan through the judicial retirement plan is de minimis. Likewise, the appellate judges' mortgages/deeds of trust did not require recusal.

The only other financial interest Stehrenberger identified was one of the appellate judge's ownership of a JPMorgan bond. This interest was also de minimis. That judge's public disclosure forms indicate ownership of a JPMorgan bond valued between $4,000 and $19,999. Under the circumstances of this case, this bond was insufficient for that judge's impartiality to "reasonably be questioned."[20] This case involved a $50,000 promissory note on which

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[19] CJC 2.11 cmt. 6(1).

[20] CJC 2.11(A).

Stehrenberger owed $46,598.53. Given JPMorgan's size, there was no reasonable possibility that an adverse ruling on this case would impact JPMorgan's finances to such an extent as to put it at risk of default on its bond obligations. This possibility was so remote that the appellate judge had no more than a de minimis economic interest.

In sum, neither the trial judge nor the panel of this court violated the Code of Judicial Conduct.

Under the facts of this case, determining whether the Code of Judicial Conduct was violated also resolves whether there was either a violation of due process or the appearance of fairness.

Due process requires recusal only in "extraordinary situation[s]."[21] Here, the de minimis financial interests Stehrenberger identifies are not an extraordinary situation. Rather, the Code of Judicial Conduct "provide[s] more protection than due process requires" on this issue.[22]

Similarly, there is no violation of the appearance of fairness doctrine. Just as the de minimis interests are insufficient to create a situation where the judges' impartiality is reasonably questioned, these interests are also insufficient to violate the appearance of fairness doctrine. "[A] reasonably prudent and

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[21] Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 887, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

[22] Id. at 890.

would flood the courts with repetitive, frivolous claims which already have been adjudicated at least once.'"[31]

But mere proof of litigiousness does not support imposing filing restrictions.[32] Additionally, trial courts "'must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses, and if appropriate the court should consider less drastic remedies.'"[33]

Here, the trial court did not abuse its discretion in imposing filing restrictions on Stehrenberger. As the court noted, her case had been decided on the merits and affirmed on appeal. After her appeal, the trial court had denied her post judgment motions. After this denial, she moved to subpoena the trial judge and the panel of this court who decided her case on appeal. The trial court determined that these continued post judgment motions were "without legal or factual basis [and] constitute[d] abuse of the judicial process."

As the court noted, Stehrenberger had received her day in court. And because JPMorgan had consistently received awards of attorney fees, the trial court could reasonably conclude that attorney fees were an insufficient sanction to deter frivolous filings.[34] Accordingly, requiring the court's leave to file additional motions was a reasonable restriction.

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[31] Id. at 693 (quoting In re Pers. Restraint of LaLande, 30 Wn. App. 402, 405, 634 P.2d 895 (1981)).

[32] Id.

[33] Id. (quoting Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)).

[34] See Stehrenberger, 2014 WL 1711765 at *6.

disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing."[23]

Thus, the trial court properly denied Stehrenberger's CR 60(b)(11) motion. Because of our resolution on this issue, we decline to reach the parties' arguments about whether Stehrenberger complied with that rule's procedural requirements.

Stehrenberger argues that retirement plans with holdings in JPMorgan are not de minimis interests because the judges' decision could "substantially affect[]" these interests. Specifically, she argues that the decision in her case could "impact [JPMorgan's] ability to collect on a bulk of other Washington Mutual-related assets."

The record does not support this argument. Stehrenberger's argument was that JPMorgan could not enforce the note because it had never physically possessed it.[24] JPMorgan was required to prove that Washington Mutual had possessed the note, not transferred the note to anyone else, and that the note's whereabouts could not be determined.[25] Thus, Stehrenberger's case was fact-intensive and unlikely to affect other assets received from Washington Mutual.

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[23] Tatham, 170 Wn. App. at 96.

[24] JPMorgan Chase Bank, N.A., 2014 WL 1711765 at *3.

[25] Id.

Stehrenberger also relies on Tumey v. Ohio[26] to argue that the interests in this case were not de minimis. But that case is distinguishable. In Tumey, a mayor who adjudicated cases received a $12 salary supplement for convictions, but no supplement for acquittals.[27] Additionally, fines imposed by the mayor funded the village government, which the mayor ran.[28] Thus, in Tumey, the financial interest was direct—the mayor received the salary supplement only for a conviction.

In contrast, for the reasons explained earlier, the financial interests in this case are so attenuated as to be de minimis.

FILING RESTRICTION

Stehrenberger argues that the court abused its discretion by ordering her not to file additional motions without the court's leave. We disagree.

Courts have discretion to impose "reasonable restrictions on any litigant who abuses the judicial process."[29] Although due process provides a right to access the courts, this right is not unlimited.[30] Courts "'are mindful of the need for judicial finality and the potential for abuse of this revered system by those who

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[26] 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

[27] Tumey, 273 U.S. at 523.

[28] Id. at 533.

[29] In re Marriage of Giordano, 57 Wn. App. 74, 78, 787 P.2d 51 (1990).

[30] Yurtis v. Phipps, 143 Wn. App. 680, 694, 181 P.3d 849 (2008).

ATTORNEY FEES

Both parties seek attorney fees on appeal. We conclude that JPMorgan is entitled to an award of attorney fees on appeal.

Parties in Washington may recover attorney fees if a statute, contract, or recognized ground of equity authorizes the award.[35] Here, the promissory note provides for attorney fees in an action to enforce the note. Because JPMorgan prevails, it is entitled to an award of attorney fees on appeal, subject to compliance with RAP 18.1.

We affirm the superior court's orders and award JPMorgan attorney fees on appeal, subject to its compliance with RAP 18.1.

Cox, J.

WE CONCUR:

[35] LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 117, 123, 330 P.3d 190 (2014).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JPMORGAN CHASE BANK, N.A.,	)	No. 73493-8-I
Respondent,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
MICHIKO STEHRENBERGER,	)	
Appellant.	)	

Appellant, Michiko Stehrenberger, has moved for reconsideration of the opinion filed in this case on April 25, 2016. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby ORDERS that the motion for reconsideration is denied.

Dated this 17th day of May 2016.

For the Court:

Cox, J.

Judge

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 11, 2016

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CASE #: 73493-8-I
JP Morgan Chase Bank, N.A., Res. v. Michiko Stehrenberger, App.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on March 11, 2016, regarding Appellant's Motion for Judicial Disqualification, Change of Venue, and Assignment to Non-Disqualified Judges:

At the direction of the panel, the motion is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 21, 2016

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CASE #: 73493-8-I
JP Morgan Chase Bank, N.A., Res. v. Michiko Stehrenberger, App.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on March 21, 2016, regarding appellant's reply and request for reconsideration on motion for judicial disqualification, change of venue, and assignment to non-disqualified judges:

At the direction of the panel, the motion is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn